Supreme Court, U.S.
FILED
NOV 22 1989
JOSEPH F. SPANIOL, JR.
CLERK

89-919

No. 89-

In The

Supreme Court of the United States

October Term, 1989

SMITH MACHINERY COMPANY, INC.,

Petitioner,

v.

HESSTON CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RICHARD C. MINZNER
JOEL K. JACOBSEN
RODEY, DICKASON, SLOAN,
AKIN & ROBB, P.A.
P.O. Box 1888
Albuquerque, New Mexico 87103
(505) 765-5900

JOHN P. EASTHAM
MARY CATHERINE MCCULLOCH
KEMP, SMITH, DUNCAN &
HAMMOND, P.C.
P.O. Box 1276
Albuquerque, New Mexico 87103
(505) 247-2315

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

Is a tying arrangement between a manufacturer and dealer a vertical nonprice restraint which is exempt from the per se rule against tying?

Did the court of appeals err when it declined to follow the decision of the New Mexico Supreme Court on issues of state law?

TABLE OF CONTENTS

	Page
Questions presented	i
Opinions below	1
Jurisdiction	1
Statutes involved	2
Statement	2
Reasons for granting the petition	7
Conclusion	14
Appendix A	1A
Appendix B	34A
Appendix C	70A

TABLE OF AUTHORITIES

Page

CASES

Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 108 S.Ct. 1515 (1988) 6, 8, 9

Carl Sandburg Village Condominium Ass'n No. 1 v. First Condominium Development Co., 758 F.2d 203 (7th Cir. 1985) 6

Continental TV, Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977) 8

Earley Ford Tractor, Inc. v. Hesston Corp., 556 F.2d 544 (W.D. Mo. 1983) 12

Fortner Enterprises v. United States Steel Corp., 394 U.S. 495 (1969) 6, 10, 12

Int'l Salt Co. v. United States, 332 U.S. 392 (1947) 7, 11, 12

Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. 2 (1984) 5, 6, 7, 8, 9, 12

Kremer v. Chemical Construction Corp., 456 U.S. 461 (1982) 14

Mozart Co. v. Mercedes-Benz of N. Am., Inc., 833 F.2d 1342 (9th Cir. 1987), *cert. denied*, 109 S.Ct. 179 (1988) 13

Northern Pac. Ry. Co. v. United States, 356 U.S. 1 (1958) 8, 11

Rodriguez de Quijas v. Shearson/American Express, Inc., 109 S. Ct. 1917 (1989) 9

Smith Machinery Corp. v. Hesston, Inc., 102 N.M. 254, 694 P.2d 501 (1985) 4

TABLE OF AUTHORITIES – Continued

Page

United States v. Loew's, Inc., 371 U.S. 38 (1962)..... 12

Will v. Comprehensive Accounting Corp., 776 F.2d 665 (7th Cir. 1985), *cert. denied*, 475 U.S. 1129 (1986) 6

STATUTES

15 U.S.C. § 1 .....2, 5

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1738..... 2

N.M. Stat. Ann. §§ 57-1-1 to -19 (Cum. Supp. 1985) 4

No. 89-

In The

Supreme Court of the United States

October Term, 1989

SMITH MACHINERY COMPANY, INC.,

Petitioner,

v.

HESSTON CORPORATION,

Respondent.

OPINIONS BELOW

The opinion of the court of appeals (App. A, infra 1A-33A) is reported at 878 F.2d 1290. The opinion of the district court (App. B, infra, 34A-69A) is reported at 1987-1 Trade Cas. (CCH) ¶ 67,563.

JURISDICTION

The court of appeals denied Petitioner's petition for rehearing and suggestion for rehearing en banc by order (App. C, infra, 70A) entered August 24, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides in relevant part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 28 U.S.C. § 1738 states that the judicial proceedings of any state "shall have the same full faith and credit in every event within the United States . . . as they have by law or usage in the courts of such state . . . "

STATEMENT

1. Smith Machinery Company is an agricultural equipment dealer located in Roswell, New Mexico, serving the geographic trade area of the Pecos River Valley. Over the years Smith carried a variety of lines of agricultural equipment including respondent Hesston's haying products. Smith became a dealer of some of respondent's products in 1950.

Since Pecos Valley farmers produce a substantial amount of alfalfa hay, Smith was able to sell substantial numbers of Hesston haying equipment including Hesston's self-propelled windrower and its big baler. Hesston controlled 100% of the market for big balers, a unique, patented haying machine, and had significant power in the markets for self-propelled windrowers and Hesston spare parts. The big baler produced a 2000-pound rectangular bale of hay and was especially popular with Pecos Valley farmers. Smith also carried the John

Deere line of farm equipment, and Smith's customers found the John Deere tractor very satisfactory.

In the mid-1970's the agricultural industry suffered a serious recession. Farm equipment manufacturers, including Hesston, experienced financial difficulties. In 1977, Fiat, an Italian based company, purchased a controlling interest in Hesston. Fiat thereafter sought to market its Italian-made tractor in the United States under the Hesston label. Hesston and Smith in 1981 executed a renewal of their dealer contract which required Smith to keep on hand each type of Hesston products applicable to Smith's trade area.

When Hesston first sought to introduce its unwanted tractor in the Pecos Valley market, it did not attempt to compete on the basis of price or quality. Rather, Hesston told Smith that it could no longer buy Hesston's desirable big baler, windrower and spare parts without also buying its unwanted tractors.

Hesston's tying arrangement gave its tractors an advantage that could not be matched by its competitors. Hesston's advantage was not based on tractor quality or price, but on its monopoly in the separate big baler market. A superior tractor manufactured by a competitor standing alone could not compete against Hesston's forced big baler/tractor combination. Every tractor sold by Hesston to dealers such as Smith represented a sale foreclosed to Hesston's competitors and kept Smith from buying a tractor it wanted to purchase. Because up to 30 tractors annually were implicated by the tie at an average cost of $35,000.00 each, Hesston's tying arrangement with

Smith represented foreclosure of free commerce in the annual amount of more than $1,000,000.00

Smith refused to carry the Hesston tractor under the terms of the agreement and Hesston terminated Smith's dealership contract. Approximately 600 Hesston dealers actually carried the Fiat tractors as compelled by the tying arrangement rather than force termination of their dealership. Smith filed suit in the state court against Hesston alleging violation of the New Mexico Antitrust Act, N.M. Stat. Ann. §§ 57-1-1 to -19 (Cum. Supp. 1985).

2. The state trial judge dismissed the state antitrust claims at the close of Smith's case-in-chief.

Following the state court dismissal, Smith took two steps to preserve its claim. First, Smith appealed the state court dismissal to the New Mexico Supreme Court. Secondly, Smith filed the present action, based on federal antitrust laws, in the New Mexico federal district court. The federal district court dismissed Smith's federal claims October 20, 1983, on the grounds that the state trial court dismissal operated to bar the federal claims due to *res judicata*. Smith appealed the federal district court's determination to the Tenth Circuit.

Thereafter, the New Mexico Supreme Court reversed the state trial court's dismissal of the state antitrust claims. The New Mexico Supreme Court held that Smith made a prima facie showing of a per se antitrust violation. *Smith Machinery Corp. v. Hesston, Inc.*, 102 N.M. at 254, 694 P.2d 501 (1985). The Tenth Circuit acknowledged the decision of the New Mexico Supreme Court and reversed the federal district court's dismissal. After

remand, the state trial court action was dismissed without prejudice and the New Mexico state antitrust claims were added to the remanded federal trial court action under the doctrine of pendent jurisdiction.

3. The federal district court entered summary judgment for respondent and dismissed Smith's claims under § 1 of the Sherman Act and the New Mexico Antitrust Act. The district court in deciding the summary judgment motion weighed the evidence and held that Hesston's tying arrangement failed "to meet the threshold requirement of a per se violation because it . . . [did] not present a substantial potential for adverse impact on competition." App. B at 68A. The district court looked to *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2 (1984) for its analytical support but characterized the "threshold question" to be answered as "whether the tying agreement presents a substantial potential for impact on competition." App. B at 51A. Respondent conceded for the purpose of summary judgment that there was a tie between two distinct products, the big baler and the Fiat tractor. Respondent also conceded on motion for summary judgment that it possessed market power in the tying products. The district court ignored these classical elements of an illegal tie and instead focused on what impact Hesston's tying arrangement would have on the farm tractor market. The district court determined "[t]he record is devoid of evidence that would support a finding that Hesston has any chance of obtaining market power in the tied product, or tractor, market." App. B at 61A. With candor the district court acknowledged that its analysis adopted the Seventh Circuit view "that a tying arrangement does not present a substantial potential for

impact on competition if there is no substantial danger of the seller acquiring market power in the tied product market as a result of the alleged tie."[1]

4. The court of appeals affirmed. It first turned Smith's tying claim on its head and labeled it a "vertical nonprice restraint." App. A at 20A. Even though both parties and the district Court relied upon the application of *Jefferson Parish* and its ancestors, the court of appeals turned to *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 108 S.Ct. 1515 (1988) and rested its affirmance upon that case. The court of appeals failed to ask or answer the questions raised by the law established by this Court as applicable to tying arrangements. Its opinion did not address whether a tie between two products existed; whether Hesston possessed market power in the big baler, or tying, product; or whether the tie foreclosed a not insubstantial volume of commerce.[2] Rather the court of appeals found Smith failed to show "that such an arrangement almost always tends to restrict competition and reduce output." App. A at 20A.

The court of appeals examined only the procompetitive effects of Hesston's conduct and concluded that

---

[1] App. B at 53A-54A, citing *Carl Sandburg Village Condominium Ass'n No. 1 v. First Condominium Development Co.*, 758 F.2d 203, 210 (7th Cir. 1985), and *Will v. Comprehensive Accounting Corp.*, 776 F.2d 665, 674 (7th Cir. 1985), *cert. denied*, 475 U.S. 1129 (1986).

[2] *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495, 497-98 (1969).

Hesston's tying arrangement increased interbrand competition because such conduct resulted in another brand of tractor being presented to the public for sale. App. A at 20A-21A. Finally, the court of appeals assumed that an imagined positive impact on the consumer's range of choice overrode any harm that the tying arrangement might impose on Smith or other agricultural farm equipment dealers or manufacturers. The court of appeals decided the impact of the tie would cause "at worst" the simple "substitution of one tractor for another" in the marketplace. App. A at 21A.

REASONS FOR GRANTING THE PETITION

1. The opinion of the court of appeals conflicts with forty-two years of decisions of this Court. Its holding sweeps aside four decades of precedent, merging two conceptually distinct categories of antitrust analysis, and in the process ignores this Court's holdings regarding tying arrangements. Since its decision in *Int'l Salt Co. v. United States*, 332 U.S. 392 (1947), this Court has consistently subjected tying arrangements to a per se analysis. The per se rule was reaffirmed as recently as five years ago in *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2 (1984). Smith alleged a violation of the per se rule against tying, and the facts shown in the record reveal a classic tie: Smith was not permitted to purchase desirable tying products (big balers, windrowers, spare parts) unless it also purchased an undesirable tied product (the tractor). The court of appeals agreed that "[t]his case involves a tying arrangement . . . " App. A at 14A.

Yet the court of appeals refused to subject the tying arrangement before it to a tying analysis. Instead, in a startling departure from established precedent, the court of appeals denied that a per se violation existed by declaring the arrangement to be a "vertical nonprice restraint," which the court defined as "an agreement between entities at different levels of distribution that does not purport to affect prices charged for the goods." App. A at 17A-18A. This definition is broad enough to encompass *all* tying arrangements. Thus the court of appeals' decision is not restricted to "full line forcing," but logically extends to all tying arrangements, and thereby effectively rewrites the entire law of tying arrangements.

Antitrust analysis of nonprice vertical restraints has long existed side-by-side with the per se rule against tying. Seven years before reaffirming the per se rule against tying in *Jefferson Parish*, this Court held that nonprice vertical restraints are not per se unlawful in *Continental TV, Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977), a decision reaffirmed in *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 108 S.Ct. 1515 (1988). In none of the cited opinions did this Court even hint at the incompatibility between these two distinct strands of antitrust analysis now claimed by the court of appeals.[3] In *Sharp*, this Court stated that "economic analysis supports the view, and *no precedent opposes it*, that a vertical

---

[3] Indeed, *Sylvania's* determination that nonprice vertical restraints are not subject to per se condemnation was based on *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1 (1958), a tying case. 433 U.S. at 49-51, 57-58. *See also id.* at 65-66 (White, J., concurring in the judgment).

restraint is not illegal *per se* unless it includes some agreement on price or price levels." *Id.* at 1525 (emphasis added). Although this Court found *Sharp* consistent with prior precedent, the court of appeals implicitly decided that *Sharp* restricted or even overruled *Jefferson Parish*. App. A at 26A. Only by first so concluding could the court of appeals decide that the tying arrangement before it was subject to analysis as a nonprice vertical restraint under *Sharp*.

The court of appeals betrayed a fundamental analytical confusion when it characterized the tie as a nonprice vertical restraint. It failed to recognize the important conceptual distinction found in this Court's opinions between tying arrangements and nonprice vertical restraints. Because the former have been subject to per se condemnation and the latter have not, the opinion destroys the careful development of the per se rule made by this Court over the past forty-two years. The consequences of the court's confusion are devastating. It is not clear which, if any, tying arrangements remain subject to the per se rule of *Jefferson Parish* within the Tenth Circuit.

By concluding that *Sharp* restricts *Jefferson Parish*, the court of appeals ignored this Court's recent admonition that the circuit courts should follow controlling Supreme Court precedent, "leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 109 S.Ct. 1917, 1921-22 (1989). Despite a cursory bow in the direction of *Jefferson Parish* in an opaque paragraph, App. A at 26A, the court of appeals failed to apply the traditional three pronged test for per se illegality which *Jefferson Parish* resoundingly reaffirmed. At no point did the court of appeals

consider whether two distinct products were involved or whether Hesston had power in the market for the tying products (both of which points Hesston conceded for purposes of its motion for summary judgment). As to the third prong of the test – whether a not insubstantial amount of commerce was foreclosed to competitors – the court of appeals ignored the rulings of this Court that this inquiry focuses solely on the dollar value of commerce affected. *Fortner Enterprises v. United States Steel Corp.*, 394 U.S. 495, 501 (1969) (*Fortner I*).

The court of appeals employed the language of the third prong of the traditional test – "foreclosure of competition in a substantial amount of commerce" – but rather than following the express command of *Fortner I*, detoured into a legally irrelevant and economically crude discussion of the market share enjoyed by one of Hesston's competitors, a non-party. App. A at 24A, 30A. The court of appeals thereby swept away the precedents of this Court relating to foreclosure of commerce and replaced them with a jumble of facts and speculation that robs the law of tying of its analytical coherence.

In sum, the court of appeals' opinion developed from a fundamental analytical confusion and is, in unsurprising consequence, wrong. The opinion not only discards forty years of precedent but also provides no comprehensible analytical replacement, thereby stripping the antitrust law relating to tying arrangements of precisely that element of certainty that is the overriding purpose of the per se rule. This Court should take the opportunity to reaffirm the traditional test which establishes a per se tying violation of the antitrust laws.

2. The decision of the court of appeals also is in direct conflict with the policies articulated by this Court in its tying decisions. The per se rule against tying is directed toward specific economic evils, all of which are present in Hesston's tying arrangement. Hesston enjoyed monopoly power in the market for its patented big baler, and used the tying arrangement to extend this power into the market for a separate product, the tractor. Its actions are thus indistinguishable from the actions of the International Salt Company that Justice Jackson termed "a restraint of trade for which its patents afford no immunity from the anti-trust laws." *Int'l Salt Co. v. United States*, 332 U.S. 392, 396 (1947). As explained by Justice Black, tying arrangements such as Hesston's "deny competitors free access to the market for the tied product, not because the party imposing the tying requirements has a better product or a lower price but because of his power or leverage in another market. At the same time buyers are forced to forego their free choice between competing products." *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 6 (1958).

The court of appeals decided this case as if these precedents did not exist. It also acted as if the economic consequences of tying arrangements condemned by this Court were trivialities, or as if this Court's economic analysis were just plain wrong. The court of appeals shrugged off the economic dislocation occasioned by Hesston's tie as the mere "substitution of one tractor for another", App. A at 21A. But such "substitution" is precisely the "pernicious effect on competition" identified in *Northern Pacific* as the chief evil addressed by the per se rule. 356 U.S. at 5. Six hundred dealers succumbed to

Hesston's tying arrangement, leading to tens of millions of dollars of such "substitutions." *See, e.g., Earley Ford Tractor, Inc. v. Hesston Corp.*, 556 F.2d 544, 548 (W.D. Mo. 1983). At the very least, the court of appeals' decision exempts from per se analysis all tying arrangements between manufacturers and dealers. Consequently, its impact will be felt across most industries, and the dollar value of commerce implicated is beyond calculation.

The court of appeals speculated at length about the procompetitive benefit of introducing a new tractor into the market. But the point made by this Court is that "tying arrangements generally serve no legitimate purpose that cannot be achieved in some less restrictive way." *Fortner Enterprises v. U.S. Steel Corp.*, 394 U.S. 495, 503 (1969). Hesston could have launched its new tractor with a competitive price or engineered it with superior quality. It could have offered dealer incentives, or invested in a major promotional campaign. But instead of competing it chose to displace competition, ruthlessly maneuvering its government-granted monopoly in one market into a multi-million dollar position of power in a second, unrelated market.

This Court's cases have long expressed "hostility to use of the statutorily granted patent monopoly to extend the patentee's economic control to unpatented products." *United States v. Loew's, Inc.*, 371 U.S. 38, 46 (1962). Far from sharing that hostility, the court of appeals suggested such extensions of patent power should be "encouraged" as promoting competition in the consumer market. App. A at 23A. That argument, of course, disputes the teachings of *Loew's*, 371 U.S. at 48-50, *Int'l Salt*, 322 U.S. at 395-96, and *Jefferson Parish*, 466 U.S. at 16.

The court of appeals wrongly considered itself free to decide anew important issues of basic antitrust policy that this Court refrained from reexamining in *Jefferson Parish* because, among other reasons, they were already decided by the Congress. 466 U.S. at 9-11 and n.15; *see also id.* at 32 (Brennan, J., concurring). None of the policy concerns raised by the court of appeals are novel; they are the basis of the disagreement between the majority and minority opinions in *Jefferson Parish*. *Compare* 466 U.S. at 14-18 *with id.* at 41-42 (O'Connor, J., concurring in the judgment). They are addressed under traditional analysis as an element of the affirmative defense of business necessity which comes into play only after the establishment of a per se violation. *See Mozart Co. v. Mercedes-Benz of N. Am., Inc.*, 833 F.2d 1342, 1348 (9th Cir. 1987), *cert. denied*, 109 S. Ct. 179 (1988).

Apparently the court of appeals was dissatisfied with the policy approach of the majority opinion in *Jefferson Parish*, and equally dissatisfied with the traditional relegation of consideration of alleged procompetitive effects to an affirmative defense. Yet it never articulated its rejection of these precedents. The result is chaos. The policy debate is muddied rather than clarified by the court of appeals' refusal to acknowledge forthrightly its rejection of Supreme Court precedent. If, as Justice O'Connor suggested in *Jefferson Parish*, the per se rule should be modified, the modification should come from this Court, in a clear policy pronouncement, rather than through the backdoor revisionism of the court of appeals.

3. The New Mexico Supreme Court held that Smith established "a prima facie case of a per se antitrust violation" under New Mexico law. 102 N.M. at 254, 694 P.2d at

501. The district court and court of appeals were obligated to give that state court determination the same preclusive effect it would enjoy in state court. *Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982). Since Smith established a prima facie case sufficient to overcome a motion for directed verdict, it follows as night follows the day that on the same showing Smith established the existence of a genuine issue of material fact sufficient to defeat a motion for summary judgment and allow this case to go to a jury. The rulings of the district court and court of appeals erred in declining to follow the decision of the New Mexico Supreme Court and are in direct conflict with *Kremer*. Certiorari should be granted to correct these errors.

CONCLUSION

The writ of certiorari should issue.

Respectfully submitted,

RICHARD C. MINZNER
JOEL K. JACOBSEN
RODEY, DICKASON, SLOAN,
AKIN & ROBB, P.A.
P.O. Box 1888
Albuquerque, New Mexico 87103
(505) 765-5900

JOHN P. EASTHAM
MARY CATHERINE McCULLOCH
KEMP, SMITH, DUNCAN &
HAMMOND, P.C.
P.O. Box 1276
Albuquerque, New Mexico 87103
(505) 247-2315

APPENDIX

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 87-1597

SMITH MACHINERY COMPANY, INC.,
Plaintiff-Appellant,

v.

HESSTON CORPORATION,
Defendant-Appellee.

July 7, 1989

Before HOLLOWAY, Chief Judge, and LOGAN and McWILLIAMS, Circuit Judges.

LOGAN, Chief Judge.

In this appeal, plaintiff Smith Machinery Corporation (Smith) argues that the district court improperly granted summary judgment against it on claims that Hesston Corporation violated section 1 of the Sherman Act, 15 U.S.C. § 1, and its New Mexico antitrust law counterpart by tying sales of Hesston tractors to sales of other Hesston farm machinery, and improperly dismissed its similar claim under section 3 of the Clayton Act, 15

U.S.C. § 14. Smith also contends that a related New Mexico state court decision precluded the federal district court's grant of summary judgment on the state claim.

Smith is a Roswell, New Mexico, dealer of irrigation equipment and farm machinery serving the Pecos Valley area. In 1950, Smith began carrying a line of Hesston farm machinery, consisting primarily of hay and forage equipment. Among the most popular Hesston products were the windrowers and the big baler. Smith also has carried a variety of other agricultural equipment lines, including a full line of John Deere products, which has been Smith's principal line of farm equipment since 1962.

In 1977 Fiat Trattori S.p.A. of Italy acquired a controlling interest in Hesston. Subsequently, Fiat sought to market its tractor in the United States as part of the Hesston product line. In 1981 Hesston approached Smith about carrying the new Hesston tractors. At the time, Hesston and Smith were parties to a distributorship contract requiring Smith

to "order, keep on hand and display a representative sample of each type of Hesston products [sic] applicable to [Smith's] trade area." I R. doc. 93 exh. A at 1. Smith declined to carry the tractors. According to its president, Smith refused the tractors because it already had successfully marketed John Deere tractors, the tractor market in the Pecos Valley was so saturated that any sales would be mere replacements, any sales of Hesston tractors would cut into John Deere sales and would not increase Smith's profits, and Smith's marketing efforts with regard to the John Deere tractors would be diminished. At no time did Hesston tell Smith it could not continue to carry competing lines of products.

After Smith refused the new tractors, Hesston terminated the dealership and entered into an agreement with the local International Harvester dealer to carry the Hesston line, including its tractors. Smith asserts that had it accepted the tractors, it would have incurred approximately $13,000 in costs the first

year for new parts, training, and other miscellaneous expenses associated with the tractors, and would have had to expand its showroom to create sufficient display space.[1]

After termination of its dealership, Smith filed suit in a New Mexico State district court, alleging, inter alia, violations of the New Mexico Antitrust Act. At the close of Smith's case-in-chief, the trial judge dismissed the state antitrust claim on the ground that representative line requirements are excepted from the general proscription of tying arrangements. While Smith appealed the decision to the New Mexico Supreme Court, it filed the instant action in federal court, alleging violations of section 1 of the Sherman Act and section 3

---

[1] Allegedly, the new dealer was required to take three tractors the first year, six tractors the second year, and nine tractors the third year. According to a Hesston sales contract, a dealer would be required to pay for a tractor nine months after shipment, although Hesston maintains that it extended these terms to assist dealers not able to make a timely payment.

of the Clayton Act, seeking treble damages. Specifically, Smith claimed that Hesston illegally tied the sale of its big baler, windrowers, and parts to purchases of the new tractors.

The federal district court held that the state court dismissal of the New Mexico antitrust claim operated to bar the federal claims on the grounds of res judicata. Subsequently, the New Mexico Supreme Court reversed the dismissal of the state claim, holding that Smith's proof of Hesston's tying arrangement established a prima facie case of a per se antitrust violation. Smith Machinery Corp v. Hesston, Inc., 102 N.M. 245, 695 P.2d 501, 510 (1985). Based on that decision, this court reversed the dismissal of the federal case. See Order No. 83-2550, Sept. 19, 1985; see also I R. doc. 15. Smith then dismissed the state action, adding the state claims to the federal court action on the basis of pendent jurisdiction.

On remand the federal district court, in a thorough memorandum opinion, granted Hesston's motion for summary judgment on

all claims. On the Sherman Act claim, the court reasoned as follows: Hesston's distribution practices did not constitute a per se violation because Hesston did not prohibit Smith from handling competitors' products and thus there was not a significant foreclosure of commerce or competition; even if Smith's limited resources effectively precluded it from handling John Deere tractors the amount of commerce thereby foreclosed was not substantial; and, there as no significant danger that Hesston could obtain market power in the tied product market. The court also held that the rule of reason was not violated since Hesston's tying arrangement actually enhanced competition in the consumer market and, again, there was no danger of Hesston acquiring market power in the tied product market. Because the New Mexico Antitrust Act states that it is to be construed in harmony with federal antitrust laws, the court also granted summary judgment on the state claim in favor of Hesston. The district court dismissed the Clayton Act claim, concluding that absent any actual sale or

contract for sale of the tied item, relief would not lie under the statute.

I

[1] Smith first contends that the New Mexico Supreme Court's ruling that Smith had presented a prima facie case of a state antitrust violation precluded the federal district court from granting Hesston summary judgment on the state claim. It urges that the doctrines of collateral estoppel, law of the case, and stare decisis bar summary judgment for Hesston. The district court held that preclusion doctrines are inapplicable in cases in which there has not been a final judgment. It also held that the law of the case doctrine does not prevent the correction of a prior erroneous ruling or apply in cases in which new evidence is presented to a court.

Preliminarily, we observe that any preclusion arguments made with regard to the state antitrust claim logically would apply to the Sherman Act claim as well.

The relevant state law[2] is patterned after section 1 of the Sherman Act, and mandates a construction "in harmony with judicial interpretations of the federal antitrust laws." N.M. Stat. Ann. § 57-1-15; see also Allen v. McCurry, 449 U.S. 90, 105, 101 S.Ct. 411, 420, 66 L.Ed.2nd 308 (1980)(state courts are obligated and able to uphold federal law); Marrese v. American Academy of Orthopaedic Surgeons, 470 U.S. 373, 380-81, 105 S.Ct. 1327, 1331-32, 84 L.Ed. 2d 274 (1985) (state court judgment may preclude later action that is within federal courts' exclusive jurisdiction). Indeed, in Smith the New Mexico Supreme Court based its judgment on federal court decisions interpreting the Sherman Act. 694 P.2d at 505-10.

We think that neither collateral estoppel nor law of the case prevented the federal district court from entering

---

[2] N.M. Stat. Ann. § 57-1-1 provides that "[e]very contract, agreement, combination or conspiracy in restraint of trade or commerce, any part of which trade or commerce is within this state, is unlawful."

summary judgment for Hesston on the state and federal antitrust claims.[3] This court and others have conditioned the invocation against a party of collateral estoppel and law of the case on that party's prior opportunity to have fully and fairly presented and argued its claims. See, e.g., Kremer v. Chemical Const. Corp., 456 U.S. 461, 480-81, 102 S.Ct. 1883, 1896-97, 72 L.Ed. 2d 262 (1982) (collateral estoppel); Willner v. Budig, 848 F.2d 1032, 1034 (10th Cir. 1988) (same), cert. denied, ___ U.S. ___, 109 S.Ct. 840, 102 L.Ed. 2d 972 (1989); Parks v. Poindexter, 723 F.2d 840, 844-45 (11th Cir. 1984) (collateral estoppel and law of the case); Dynalectron Corp. v. United States, 4 Cl.Ct. 424, 431 (1984) (law of the case), aff'd mem., 758 F.2d 665 (Fed. Cir. 1984). Courts also require a prior final

---

[3] Smith's assertion of stare decisis in the preclusion context is misplaced since that doctrine goes to the precedential value of a prior determination, and not to the narrow inquiry of whether a party is precluded from relitigating an issue. Cf. Stevenson v. Sears, Roebuck & Co., 713 F.2d 705, 711 (Fed. Cir. 1983).

judgment, at least on the specific issues sought to be foreclosed from relitigation, before a party may invoke collateral estoppel or law of the case. See, e.g., Eilrich v. Remas, 839 F.2d 630, 632 (9th Cir.) (collateral estoppel), cert. denied, __ U.S. __, 109 S.Ct. 60, 102 L.Ed. 2d 38 (1988); R.L. Clark Drilling Contractors, Inc. v. Schramm, Inc., 835 F.2d 1306, 1307 n. 2 (10th Cir. 1987) (law of the case); cf. Employees Own Fed. Credit Union v. City of Defiance, 752 F.2d 243, 245 (6th Cir. 1985) (relaxation of final judgment rule in collateral estoppel context appropriate in civil case when prior decision is "sufficiently firm to be accorded conclusive effect"). New Mexico courts impose the "full and fair opportunity to litigate" and "final judgment" requirements on the invocation of collateral estoppel. E.g., Reeves v. Wimberly, 107 N.M. 231, 755 P.2d 75, 78-79 (Ct. App. 1988).

The New Mexico state district court had dismissed Smith's action after Smith had presented its case and before Hesston put on any evidence. The state supreme court

reversed, holding that Smith had made out a prima facie case. In holding that Smith had presented a prima facie case of a per se antitrust violation, the New Mexico Supreme Court stressed that its "review of the relevant evidence [was] directed solely at the narrow issue presented and [was] not to be construed as a commentary on the ultimate merits of the antitrust claim," Smith, 694 P.2d at 509, 510. Further, the supreme court directed the district court on remand to hold a trial and determine "whether Smith's prima facie case [was] rebutted or whether any business exceptions [were applicable]." Id. at 510. Hesston's opportunity to rebut was frustrated, of course, by Smith's dismissal of the state case and its adding the state antitrust claim to its federal lawsuit.

All the New Mexico Supreme Court decided was that Smith had made out a prima facie case for a state antitrust violation. Arguably by dismissing its case after the Supreme Court ruling and before further proceedings the situation in federal court should be as if the state

suit never had been filed. In any event, when the federal court in the instant action considered Hesston's motion for summary judgment, it had before it depositions and affidavits presented by both parties, as well as trial testimony from the state proceedings. The court apparently believed that even if Smith had proved a prima facie violation in the state action, such proof had been rebutted upon the consideration of a complete records. We see no compelling reasons for forbidding the district court's exercise of its summary powers merely because a different court, finding itself in a wholly different procedural posture, thought the plaintiff's case strong enough to withstand dismissal before rebuttal evidence was produced. Thus, the district court properly entertained Hesston's motion for summary judgment.

II

A

We next consider the district court's grant of summary judgment in favor of Hesston on the Sherman Act claim. Smith

argues that the district court, by comparing Smith's case to Hesston's rebuttal evidence, impermissibly weighed competing evidence at the summary judgment stage. But as the Supreme Court recently has made clear, there is a crucial difference between weighing evidence, which a trial judge may not do when ruling on a motion for summary judgment, and determining whether there exists a genuine issue for trial. In Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48, 106 S.Ct. 2505, 2509-10, 91 L.Ed. 2d 202 (1986), the Court noted that under Fed.R.Civ.P. 56(c), "the mere existence of some alleged factual dispute ... will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." (emphasis in original). In an ordinary civil case like the one before us, "[t]he judge's inquiry ... unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict." Id. at 252, 106 S.Ct. at 2512. The district court's

memorandum opinion indicates that it understood its assigned task. Nothing in the record indicates that the court improperly weight Smith's evidence against Hesston's.

Smith's primary contention is that there was sufficient evidence of an illegal tying arrangement to create an issue for trial. A tying arrangement has been defined as "an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product." Northern Pac. Ry. Co. v United States, 356 U.S. 1, 5, 78 S.Ct. 514, 518, 2 L.Ed. 2d 545 (1958). This case involves a tying arrangement known as "full-line" or "representative-line" forcing, whereby a manufacturer agrees to license or franchise a dealer to sell its products, but only on condition that the dealer sell a full or representative line of those products. See Joffe, Tying and Exclusive Dealing Arrangements, 589 Practising Law Institute/Corporate Handbook Series 643 (1988); see also L. Sullivan, Antitrust § 158, at 457 (1977).

As a preliminary matter, we note that to establish a violation of section 1 of the Sherman Act, the complaining party must prove an agreement or concerted activity between separate parties to restrain trade--that is, a "contract, combination or conspiracy." Fisher v. City of Berkeley, 475 U.S. 260, 266-67, 106 S.Ct. 1045, 1049-50, 89 L.Ed. 2d 206 (1986); McKenzie v. Mercy Hosp. of Independent, Kan., 854 F.2d 365, 367-68 (10th Cir. 1988). Here, Smith refused to accede to Hesston's request to carry its tractors, but a franchisee is allowed to "charge a combination between . . . [the franchisor] and other franchise dealers, whose acquiescence in [the] firmly enforced restraints was induced by 'the communicated danger of termination.'" Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 142, 88 S.Ct.1981, 1986, 20 L.Ed. 2d 982 (1968) (citation omitted); see also Will v. Comprehensive Accounting Corp., 776 F.2d 665, 669-70 (7th Cir. 1985), cert denied, 475 U.S. 1129, 106 S.Ct. 1659, 90 L.Ed. 2d 201 (1986); Black Gold, Ltd. v. Rockwool

Indus., Inc., 729 F.2d 676, 685-86, and 732 F.2d 779, 780 (10th Cir.), cert. denied, 469 U.S. 854, 105 S.Ct. 178, 83 L.Ed. 2d 113 (1984). Smith failed, however, to allege any sort of concerted action between Hesston and other dealers. See I R. doc. 29 (Second Amended Complaint). But Hesston does not here, nor did it at the trial court level, argue that this pleading failure warranted dismissal of Smith's Sherman Act claim. Thus, we do not decide whether dismissal of the Sherman Act count on these grounds would be warranted had Hesston raised the issue, and we consider the merits of Smith's claim of a tying violation.[4]

---

[4] On appeal, Smith does point to deposition testimony in the record by a Hesston vice-president who admitted testifying in an unrelated trial that he was sure some dealers took on Hesston tractors under threat of termination, although he had no personal knowledge of such an occurrence. The vice-president also had admitted that Hesston had a policy of terminating dealers that refused to stock the tractors if a replacement dealer in the area could be found.

B

The Supreme Court has indicated that "certain tying arrangements pose an unacceptable risk of stifling competition and therefore are unreasonable 'per se.'" Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 9, 104 S.Ct. 1551, 1556, 80 L.Ed. 2d 2 (1984). However, section 1 of the Sherman Act only prohibits "[e]very contract, combination . . ., or conspiracy, in restraint of trade or commerce." 15 U.S.C. § 1. Thus, the question of whether Hesston's alleged line forcing constitutes a "tying arrangement" is largely irrelevant. See Jefferson Parish, 466 U.S. at 21 n. 34, 104 S.Ct. at 1563 n. 34. Rather, "[t]he legality of [the challenged] conduct depends on its competitive consequences, not on whether it can be labeled 'tying.'" Id.

Line forcing, be it full or representative, is a vertical nonprice restraint--an agreement between entities at different levels of distribution that does not purport to affect prices charged

for the goods.[5] See Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 108 S.Ct. 1515, 1522-23 & n. 4, 99 L.Ed. 2d 808 (1988) (definition of a "vertical restraint"); see also Easterbrook, Vertical Arrangements and the Rule of Reason, 53 Antitrust L.J. 135, 135 (1984). In its most recent examination of the per se illegality of vertical

---

[5] In this particular case, the alleged line forcing might better be termed a vertical "arrangement" rather than "restraint" since Smith was not prohibited from carrying the product lines of competitors as it would be under an exclusive dealing arrangement, the classic "vertical restraint." Smith was "restrained," however, in the sense that it was obligated to carry a representative line of Hesston products and it could not refuse to do so without violating the terms of the distributorship contract. A "horizontal restraint," on the other hand, represents "an agreement among competitors on the way in which they will compete with one another" and is often held to be unreasonable as a matter of law. NCAA v. Board of Regents, 468 U.S. 85, 99, 104 S.Ct. 2948, 2959, 82 L.Ed.2d 70 (1984); see also Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 108 S.Ct. 1515, 1523 n. 4, 99 L.Ed.2d 808 (1988).

restraints, the Supreme Court held that an alleged agreement between a manufacturer and a dealer to terminate another dealer due to alleged price cutting was not a per se violation of section 1 of the Sherman Act. Sharp, 108 S.Ct. at 1521, 1525. The Court noted that "per se rules are appropriate only for 'conduct that is manifestly anticompetitive,' that is, conduct 'that would always or almost always tend to restrict competition and decrease output.'" Id. 108 S.Ct. at 1519 (citations omitted). Further, in analyzing the vertical nonprice restraint at issue in that case the Court was guided by certain premises: (1) ordinarily, rule of reason analysis should be employed to determine whether a practice violates the Sherman Act; (2) departure from the rule of reason must be justified by demonstrable economic effect, such as cartel facilitation; (3) antitrust law primarily is concerned with interbrand and not intrabrand competition; and (4) in evaluating vertical restraints, courts should protect the doctrine of Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S.

36, 97 S.Ct. 2549, 53 L.Ed. 2d 568 (1977), which is that vertical nonprice restraints such as exclusive territory agreements are not illegal per se and should be judged under the rule of reason. Sharp, 108 S.Ct. at 1520-21. The Court concluded that "economic analysis supports the view, and no precedent opposes it, that a vertical restraint is not illegal per se unless it includes some agreement on price or price levels." Id. 108 S.Ct. at 1525.

[2] Taking Sharp as our guide, and viewing the conduct before us as a vertical nonprice restraint, Hesston's line requirement is not a per se violation of the Sherman Act. Smith has not shown that such an arrangement almost always tends to restrict competition and reduce output. Cf. Id. at 108 S.Ct. 1519. On the contrary, common sense informs us that in most cases when, as here, the manufacturer does not prohibit a dealer from carrying competing lines, line forcing enhances interbrand competition by making another tractor available for sale

to the public.[6] Further, not even Smith contends that the line requirement would lower total output in the market for tractors below pre-existing levels. At worst, there simply would be a substitution of one tractor for another.

Smith argues, however, that due to its limited financial resources the line requirement would have restricted competition because every forced purchase of a Hesston tractor it made effectively

---

[6] In Fox Motors, Inc. v. Mazda Distribs. (Gulf), Inc., 806 F.2d 953, 957 (10th Cir. 1986), we noted in dictum that procompetitive benefits arising from a challenged practice generally are disregarded under a per se analysis. However, as we observed there, 806 F.2d at 957 n. 2, the Supreme Court has indicated that "considerable market analysis," including an examination of procompetitive justifications for a questioned practice, may be necessary when determining if a practice meets the elements of the per se violation. See NCAA, 468 U.S. at 104 n. 26, 104 S.Ct. at 2961 n. 26; see also Jefferson Parish, 466 U.S. at 34-35, 104 S.Ct. at 1569-70 (O'Connor, concurring in judgment). The instant case is one in which it is difficult to discuss why a practice is not anticompetitive without, at the same time, discussing why it is procompetitive.

would have foreclosed the purchase of a John Deere tractor. Even if this assertion were true, the argument is misplaced. The primary objective of the Sherman Act is to benefit consumers by promoting efficient and beneficial competition. See NCAA, 468 U.S. at 107, 104 S.Ct. at 2963; Jefferson Parish, 466 U.S. at 15, 104 S.Ct. at 1559; Grappone, Inc. v. Subaru of New England, Inc., 858 F.2d 792, 794 (1st Cir. 1988); Westman Comm'n Co. v. Hobart Int'l, Inc., 796 F.2d 1216, 1220 (10th Cir. 1986), cert. denied, ____ U.S. ____, 108 S.Ct. 1728, 100 L.Ed. 2d 192 (1988). The antitrust laws were designed to protect competition, not competitors. Brown Shoe Co. v. United States, 370 U.S. 294, 320, 82 S.Ct. 1502, 1521, 8 L.Ed. 2d 510 (1962); Grappone, 858 F.2d at 794. In general, the broader the consumers' range of choice, the better off they are. Thus, this court has considered alleged antitrust violations "in light of [their] effect on consumers, not on competitors." Westman, 796 F.2d at 1220. To the extent that a manufacturer's distribution practices enhance competition

in the consumer market, they should be encouraged despite their effect on suppliers and distributors operating in an intermediate distribution market. Therefore, even if proved, Smith's allegation that Hesston's line requirement would restrict its ability to carry and sell as many John Deere tractors as it wished does not establish a per se violation of the Sherman Act. Rather, Smith would have to show that Hesston's line requirement so restricted the marketing of John Deere products that it impeded competition in the consumer market. Cf. Pitchford v. Pepi, Inc., 531 F.2d 92, 101 (3d Cir.)("there can be no liability under a full-line forcing count absent a showing of foreclosure of competition in a substantial amount of commerce"), cert. denied, 426 U.S. 935, 96 S.Ct. 2649, 49 L.Ed. 2d 387 (1976), Colorado Pump & Supply Co. v. Febco, Inc., 472 F.2d 637, 641 (10th Cir.)("The mere existence of the requirement that the full line be stocked, without additional information about its competitive impact, does not suffice to establish an

unreasonable restraint of trade."), cert. denied, 411 U.S. 987, 93 S.Ct. 2274, 36 L.Ed. 2d 965 (1973). This Smith failed to do.

According to uncontradicted statistics in Hesston's brief, in 1982 John Deere sold approximately thirty percent of all farm machinery in North America. Deere's share of the North American tractor market was estimated to be twenty-seven percent in 1980 and thirty percent in 1985. If Deere became displeased with the number of its tractors being sold by Smith because Smith also sold Hesston tractors, it had the market power and resources to distribute its products through a different outlet--either through another local dealer or by vertically integrating itself. Or, as actually happened here, Smith could choose to continue selling only Deere tractors and assume the risk that Hesston would take its product line to a dealer willing to carry and sell its entire line. This is precisely the type of competitive behavior the Sherman Act was designed to encourage. In fact, forcing Hesston to foregoing established

distribution channels to introduce a new product likely would have an anticompetitive effect.

It is clear in this case that the line forcing imposed by Hesston was being used as a tool to compete, and not to restrain competition. Had Hesston not been trying to add a new product to its line with an existing distributor, but rather had come to Smith initially with its full complement of products including its tractor, it freely could have gone elsewhere on Smith's refusal to sell the whole line. Similarly, in the existing situation, we see no compelling reasons to "restrict the autonomy of independent businessmen" when it fosters competitive practices, Westman, 796 F.2d at 1220, simply because Smith did not wish to disturb its current product mix. It may be, as here, that a dealer may suffer a loss of profit from not being able to carry every product that it wishes. But the Sherman Act does not protect a dealer's right to maximize profits. Cf. L. Sullivan, supra p. 10, § 158, at 457 (in the line-forcing context, "[a]bsent a

showing of a significant foreclosure of competitors, it is no doubt more constructive to treat the interests of the manufacturer as adequately counterbalancing the dealer's interest in a wider product choice.")

The district court and both parties focused primarily on the application of Jefferson Parish to the facts of this case, no doubt because Sharp had not been decided at the time of the district court's decision. The opinion in Sharp did not mention Jefferson Parish, although we believe the analysis in Sharp requires a holding that line forcing is a vertical nonprice restraint that is not illegal per se.

In our view, there are compelling reasons for making a distinction between line forcing, normally viewed as a method of competing, and traditional tying practices viewed as serving "hardly any purpose beyond the suppression of competition." Standard Oil Co. v. United States, 337 U.S. 293, 305-06, 69 S.Ct. 1051, 1058, 93 L.Ed. 1371 (1949). In a line forcing situation, where a dealer is

serving as an intermediate link in a distribution chain, if one manufacturer is foreclosed from selling to a dealer because of the arrangement, it is likely going to find another way to take its product to market, providing a profit potential continues to exist. In such a case, there is no ultimate foreclosure to the consumer of a choice of goods. In other more traditional tying arrangements there is an ultimate foreclosure of choice to the ultimate consumer. See, e.g., Jefferson Parish, 466 U.S. at 5, 104 S.Ct. at 1554 (anesthesiology tied to use of hospital); United States v. Loew's Inc., 371 U.S. 38, 40, 83 S.Ct. 97, 99, 9 L.Ed. 2d 11 (196)(unpopular films tied to feature films); Northern Pac. R. Co., 356 U.S. at 3, 78 S.Ct. at 516 (rail services tied to transfers of land); International Salt Co. v. United States, 332 U.S. 392, 393, 68 S.Ct. 12, 14, 92 L.Ed. 20 (1947) (salt tied to salt machines). Thus, a foreclosure of choice to an ultimate consumer appears to be the principal key to a tie that is illegal per se. No such foreclosure occurs or is threatened in a

typical line forcing situation such as that at bar.

Having said this, we believe that even if the Court were to subject manufacturer line requirements to the traditional tying analysis set forth in Jefferson Parish, Hesston's arrangement still would pass per se scrutiny. In Jefferson Parish, the Court held that to find a per se violation, a court first must determine that a substantial amount of commerce is foreclosed under the challenged arrangement, and then that it is likely the seller is forcing the tied product onto the buyer in an anticompetitive manner. 466 U.S. at 15-16, 104 S.Ct. at 1559-1560. The Court noted that the existence of market power in the tying product is a good indication that anticompetitive forcing is taking place. Id. at 16-18, 104 S.Ct. at 1560-62. As our foregoing discussion illustrates, the likelihood that Hesston's policy causes anticompetitive forcing is virtually nil. Thus, we hold that summary judgment on Smith's per se allegations was proper. This, however, does not end our inquiry.

If Smith has raised an issue of material fact under the rule of reason, summary judgment on the Sherman Act and state claim still would have been error.

C

As stated by the Supreme Court, "the inquiry mandated by the Rule of Reason is whether the challenged agreement is one that promotes competition or one that suppresses competition." National Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 691, 98 S.Ct. 1355, 1365, 55 L.Ed. 2d 637 (1978). In other words, the rule "requires the factfinder to decide whether under all the circumstances of the case the restrictive practice imposes an unreasonable restraint on competition." Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332, 343, 102 S.Ct. 2466, 2472, 73 L.Ed. 2d 48 (1982) (footnote omitted). This inquiry normally involves an examination of a variety of actual market factors. Chicago Bd. of Trade v. United States, 246 U.S. 231, 238, 38 S.Ct. 242, 243, 62 L.Ed. 683 (1918). The plaintiff, however, has the burden of showing that

the challenged arrangement had an "actual adverse effect on competition." Jefferson Parish, 466 U.S. at 29, 31, 104 S.Ct. at 1567, 1568.

We have no trouble concluding that Smith failed to make a sufficient showing in this case. The only evidence of "anticompetitive" effect Smith offers, as discussed above, is disputed affidavit statements by one of its officers that each purchase of a Hesston tractor would preclude the purchase of a John Deere tractor. Yet, as long as Hesston's arrangement does not preclude John Deere from taking its tractors to market, either through Smith or through another distributor, competition has not been impaired; to the contrary, it has been enhanced. The fact that Smith made a conscious decision to risk the loss of the entire Hesston line by refusing the tractors, rather than give up some sales of John Deere tractors, indicates that Deere would have had no trouble finding a satisfactory outlet for its products. Based on the allegations and evidence before the district court, a reasonable

jury could not have found for Smith on its Sherman Act claim and the corresponding state claim. Thus, we hold that the district court properly granted Hesston's motion for summary judgment.

III

Smith also contends that the district court erroneously dismissed its claim that Hesston's line requirement violated section 3 of the Clayton Act, 15 U.S.C. § 14. Section 3 provides in pertinent part that "[i]t shall be unlawful for any person engaged in commerce . . . to lease or make a sale or contract for sale of goods . . . where the effect of such lease, sale, or contract for sale . . . may be to substantially lessen competition or tend to create a monopoly in any line of commerce." 15 U.S.C. § 14. The district court relied on this court's decision in Black Gold, Ltd. v. Rockwool Industries, Inc., 729 F.2d 676, 685 (10th Cir.), cert. denied, 469 U.S. 854, 105 S.Ct. 178, 83 L.Ed. 2d 113 (1984), in which we held that section 3 does not cover a manufacturers' alleged wrongful

refusal to deal with a customer "in the absence of an actual sale or lease to the plaintiff." If the requirement of an actual transaction applies to sales or leases, it must apply to a contract for sale as well. See Ron Tonkin Gran Turismo, Inc. v. Fiat Distribs., Inc., 637 F.2d 1376, 1389 (9th Cir.) ("Section 3 of the Clayton Act has no application in the absence of an executed agreement"), cert. denied, 454 U.S. 831, 102 S.Ct. 128, 70 L.Ed. 2d 109 (1981).

[3] Smith strenuously argues that an actual contract for sale did exist between Hesston and itself at the time Hesston attempted to enforce the line-requirement provision of the distributorship agreement. In reality, however, what existed between the two parties at that time was not a contract for sale of the "tied" goods (i.e. the tractors), but rather a general distributorship agreement obliging Smith to carry a representative line of Hesston products. Smith refused to purchase any of the tractors. Thus, no purchase order for the tractors, which would have constituted a sales contract,

was ever executed by either party. A mere franchise agreement, defining general terms and obligations of the relationship, does not rise to the level of an executed contract for sale as required by section 3.

This result may seem at odds with the purposes underlying the antitrust laws considering, as Smith argues, that a person would need to engage in "unlawful" sales in order to invoke the protection of section 3. However, as noted in Black Gold, 729 F.2d at 685, section 1 of the Sherman Act has been interpreted to cover wrongful refusals to deal. We do not interpret section 3 of the Clayton Act as providing a cumulative remedy, particularly when, at least for allegations of unlawful tying arrangements, the required showings under both the Sherman and Clayton Act are identical. See id. at 684 n. 5. The district court properly dismissed Smith's Clayton Act claim.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. CIV-82-1299 SC

Smith Machinery Company, Inc., Plaintiff

v.

Hesston Corporation, Defendant

March 26, 1987

MEMORANDUM OPINION

This is an antitrust suit under § 1 of the Sherman Act (15 U.S.C. § 1), § 3 of the Clayton Act (15 U.S.C. § 14), and the New Mexico Antitrust Act (N.M.Stat.Ann. §§ 57-1-1 through 57-1-19 (1985 Cum. Supp.)). Smith Machinery Company, Inc. (Smith) is a retail distributor of farm equipment in the Pecos Valley, New Mexico area. Hesston Corporation (Hesston) is a manufacturer of farm equipment. Smith alleges that Hesston violated federal and state antitrust law by attempting to tie the sale of its new line of tractors to the sale of Hesston's other products. The matter is before the Court on Hesston's Motion to Dismiss Clayton Act claim and

Motion for Summary Judgment dismissing Claims Under the Sherman Act and New Mexico Antitrust Act. The Court finds that both Motions should be granted.

LEGAL STANDARD

For purposes of ruling on a Motion to Dismiss, the allegations of the Complaint are taken as true. Jenkins v. McKeithen, 395 U.S. 411, 421, reh'g denied, 396 U.S. 869 (1969); Dewell v. Lawson, 489 F.2d 877, 879 (10th Cir. 1974). Only if, after liberal construction of the pleadings, there appears no possibility that the Plaintiff can prove a set of facts which would entitle it to relief should the motion to dismiss be granted. Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Owens v. Rush, 654 F.2d 1370, 1378-79 (10th Cir. 1981).

A motion for summary judgment is property granted only when there is no genuine issue as to any material fact. Fed.R.Civ.P. 56; Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970). The burden of establishing that no genuine issue exists as to any material fact is on the movant. Adickes, 398 U.S. at 157. That burden

"may be discharged by 'showing' - that is, pointing out to the District Court - that there is an absence of evidence to support the nonmoving party's case." Celotex Corp. v. Catrett, 54 U.S.L.W. 4775, 4778 (U.S. June 25, 1986). Summary judgment is proper against a party "who fails to make a showing sufficient to establish the existence of an essential element to that party's case, and on which that party will bear the burden of proof at trial." Id. at 4777. The standard for granting summary judgment mirrors the standard for granting a directed verdict under Fed. R. Civ. P. 50(a). Id. The facts must, however, be construed in favor of the nonmovant, and the Court must consider inferences that can be drawn from those facts tending to show triable issue. Buell Cabinet Co., Inc. v. Sudduth, 608 F.2d 431, 433 (10th Cir. 1979); Luckett v. Bethlehem Steel Corp., 618 F.2d 1373, 1377 (10th Cir. 1980).

Smith points out that summary judgment should be used sparingly in antitrust litigation. Poller v. Columbia Broadcasting System, 368 U.S. 464, 473

(1962). This rule has developed primarily in conspiracy cases in which the proof is largely in the hands of the alleged conspirators, and in which the motive and intent of the defendants are at issue. Id. See also Fragale & Sons Beverage Co. v. Dill, 760 F.2d 469, 472 (3d Cir. 1985); Penne v. Greater Minneapolis Area Board of Realtors, 604 F.2d 1143, 1151 (8th Cir. 1979); Aladdin Oil Co. v. Texaco, Inc., 603 F.2d 1107, 1110-1112 (5th Cir. 1979). Neither of those considerations plays an important role in the instant case. Moreover, summary judgment is certainly proper in some antitrust cases, especially when, as here, the facts are fully developed through discovery. Each of the Tenth Circuit cases cited by Smith so found, and affirmed summary judgments entered in faVor of antitrust defendants. Curtis v. Campbell-Taggert Inc., 687 F.2d 336, 338 (lOth Cir.), cert. denied, 459 U.S. 1090 (1982), reh'g denied, 459 U.S. 1229 (1983); Comet Mechanical Contractors, Inc. v. Cowen Construction, Inc., 609 F.2d 404, 405 (lOth Cir. 1980); Farrell v. Albuquerque Publishing Co., 589 F.2d 497,

502 (10th Cir. 1978). These cases further noted that summary judgment is an appropriate tool for avoiding expensive, burdensome, and unnecessary litigation. Id.

FACTS AND PROCEDURAL HISTORY

With the foregoing standards in mind, the Court considered the following facts. Smith Machinery is a pump business and agricultural equipment dealership which includes a parts and service department. Smith is located in Roswell, New Mexico, and primarily serves the Pecos Valley area. Smith became a dealer of Hesston products in 1950. Over the years Smith has carried a variety of other lines of agricultural equipment. At the time relevant to this lawsuit, and for some time prior thereto, Smith also carried the John Deere line. John Deere is considered a long line manufacturer. Hesston does not produce a complete line, but produces primarily a hay and forage line.

Pecos Valley farmers produce a substantial amount of alfalfa hay. Smith carried a variety of Hesston haying equipment, including Hesston's self-

propelled windrower and its big baler, a baling machine which produces a 2000-pound rectangular bale. The big baler was especially popular with Pecos Valley farmers, and Smith was very successful in marketing the Hesston big baler.

In the mid-1970s the agricultural industry was suffering a serious recession. Farm equipment manufacturers, including Hesston, experienced financial difficulties. In 1977 Fiat, an Italian-based company, purchased a controlling share of the stock in Hesston. Fiat subsequently sought to market its Italian-made tractor in the United States under the Hesston label.

In 1981 Smith and Hesston were parties to a contract which required Smith to "keep on hand and display a representative sample of each type of Hesston products applicable to [Smith's] trade area." The contract was terminable by either party on thirty days' notice.

In 1981 a Hesston representative approached Smith about carrying the new Hesston tractor line. Smith indicated that it was not interested in carrying

another line of tractors in addition to the John Deere tractors it already carried. Smith expressed the opinion that the John Deere tractor was very satisfactory to Smith's customers and that it did not believe there was a market in the Pecos Valley for the Hesston tractor. Smith asserted that it would be too expensive for it to carry an additional product.[1]

Several meetings were held between Smith representatives and Hesston representatives regarding the Hesston tractor. Hesston advised Smith that its dealership would be terminated if Smith refused to carry the Hesston tractor.[2]

---

[1] According to Hesston, Smith further indicated that it did not wish to jeopardize its relationship with John Deere by carrying a competitive tractor, but that assertion is controverted by Smith.

[2]This is a disputed issue. Hesston asserts that the termination was prompted, at least in part, by Hesston's general dissatisfaction with the Smith dealership. Hesston asserts that Smith was a "cherry-picker," taking advantage of Hesston's best selling items and making no effort with respect to the rest of the line.

Smith did refuse, and Hesston terminated Smith's contract. Smith never took or agreed to take any of Hesston's tractors. Hesston entered into an agreement with Estes International, the Roswell International Harvester dealer, whereby Estes would carry the Hesston line, including the tractors.

Smith filed suit against Hesston and Estes International in state district court, alleging violations of the New Mexico Motor Vehicle Dealers Franchising Act, N.M. Stat. Ann. §§ 57-16-1 to 16 (1978), and the New Mexico Antitrust Act,

---

Hesston also alleges that it was dissatisfied with Smith's wait-and-see approach to marketing. Smith usually employed no outside sales people. Rather, Smith waited for customers to come in to the showroom to make a sale. Estes, on the other hand, had a more aggressive sales approach and did employ an outside sales force. For purposes of ruling on these motions, the Court accepts as true Smith's view of the reason for termination of the dealership. As explained below, the Court finds that summary judgment in favor of the Defendant is proper even if the sole reason for termination was Smith's refusal to carry the Hesston tractor.

N.M. Stat. Ann. §§ 57-1-1 to 19. Smith also filed this action in federal court alleging violations of the federal antitrust laws. The state and federal antitrust claims were premised on the alleged unlawful attempted tying of Hesston's tractor to its other products.

The state trial judge dismissed the state antitrust claims at the close of Smith's case-in-chief on the ground that representative line requirements are an exception to the proscription against tying arrangements.[3] On the basis of the state court decision, this Court dismissed Smith's Complaint on res judicata grounds. Smith appealed the state court decision to the New Mexico Supreme Court and appealed this Court's decision to the Tenth Circuit Court of Appeals. The New Mexico Supreme Court reversed the trial court's dismissal of the state antitrust claim, finding that per se analysis is applicable to the case and finding that Smith made a prima facie

---

[3]The transcript of that proceeding is part of the record presently before the Court. A substantial amount of other evidence is also before the Court.

showing of a per se violation. Smith Machinery Corp. v. Hesston, Inc., 102 N.M. 245, 254, 694 P.2d 501 (1985). On the basis of the New Mexico Supreme Court's decision, the Tenth Circuit reversed this Court's dismissal of the federal claims. After remand, the state court case was dismissed, and Smith amended its Complaint in this action to include the state claim. Thus, after many years of pending litigation in two forums, appeals to the New Mexico Supreme Court and to the Tenth Circuit Court of Appeals, and following extensive discovery and preparation, the antitrust claims are before this Court on the dispositive motions of the Defendant.

OPINION

I. RES JUDICATA AND LAW OF THE CASE. Smith initially urges that the Court is precluded by the doctrine of res judicata or by the doctrine of law of the case from considering Hesston's Motion for Summary Judgment. Smith argues that because the New Mexico Supreme Court has held that Smith made a prima facie showing of a per se violation of § 1 of the Sherman Act, this Court is precluded from finding that

the case does not merit per se treatment or from finding that summary judgment is proper because there is an absence of evidence to support any element of Smith's prima facie case.

A. Res Judicata. The doctrine of res judicata is inapplicable to the circumstances of this case. For res judicata to apply, there must have been a final decision in the first suit. First State Bank v. Muzio, 100 N.M. 98, 100, 666 P.2d 777 (1983). When a judgment has been reversed and the case has been remanded for further proceedings, there can be no preclusion until a new final judgment is entered. Wright & Miller, Federal Practice and Procedure: Civil § 4432. If the matter is dropped after remand without proceeding to a new final judgment, res judicata does not apply. Id.; Aurora City v. West, 7 Wall. 82, 93, 19 L.Ed. 42 (1868). A remand from an appellate court is not considered final, since the proceedings are still pending. Los Angeles NAACP v. Los Angeles Unified School, 518 F. Supp. 1053, 1058-59 (C.D. Cal. 1981), rev'd on other grounds, 714

F.2d 946 (9th Cir. 1983), cert. denied, 467 U.S. 1209 (1984); East Bay Union of Machinists, Local 1304 v. Fireboard Paper Products Corp., 285 F. Supp. 282, 286-87 (N.D. Cal. 1968), aff'd 435 F.2d 556 (9th Cir. 1970). An appellate reversal has the effect of returning the case to the trial court as if no judgment had ever been rendered. Id.; Minnick v. California Department of Corrections, 452 U.S. 105, 126 n. 37 (1981) (construing California law). See also Restatement (Second) of Judgments § 13, comment b. Therefore, there is no final judgment in the state court which would preclude consideration of Defendant's Motion for Summary Judgment under the doctrine of res judicata.

B. Law of the Case. The doctrine of law of the case regulates judicial affairs before final judgment. Wright & Miller, Federal Practice and Procedure: Civil § 4478. Unlike res judicata, the law of the case doctrine is not a limit on the power of the court to reopen what has already been decided. Rather, it is a matter of the practice of courts generally to refuse to do so. Arizona v.

California, 460 U.S. 605, 618 (1983); Loumar, Inc. v. Smith, 698 F.2d 759, 762 (5th Cir. 1983). Law of the case doctrine is discretionary even when the case is transferred from state to federal court. Quinn v. Aetna Life and Casualty Co., 616 F.2d 38, 40, (2d Cir. 1980).

At the outset, the Court notes that the only antitrust claim before the New Mexico Supreme Court was the claim based on the New Mexico Antitrust Act. Plaintiff's claims based on the Sherman Act and the Clayton Act were not the subject of any state court rulings, and the state court proceedings could not have established the law of the case with respect to the federal claims. Only issues actually decided, not those that could have been decided, become the law of the case. Quern v. Jordan, 440 U.S. 332, 347 n. 18 (1979); Bouchet v. National Urban League, Inc., 730 F.2d 799, 806 (D.C. Cir. 1984). Therefore, even if the doctrine of law of the case were applicable here, the Court

would only be precluded from making its own ruling on the state claim.[4]

However, the Court finds that it is not precluded by the law of the case from determining all issues presented in Defendant's Motion for Summary Judgment. "[I]t is not improper for a court to depart from a prior holding if convinced that it is clearly erroneous and would work a manifest injustice." Arizona v. California, 460 U.S. at 618 n. 8. Appellate courts have affirmed a subsequent correct ruling, rather than reversing on the simplistic ground that the Court had departed from the law of the case established by an earlier ruling. Hill v. BASF Wyandotte Corp., 696 F.2d 287, 290 n. 2 (4th Cir. 1982); Parmelle Transportation Co. v. Keeshin, 292 F.2d 794, 797 (7th Cir. 1961). Even when the litigation is in an advanced stage, the law of the case should not prevent a court

---

[4]The state claim could, of course, be dismissed in the Court's discretion under the doctrine of pendent jurisdiction. United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966).

from setting aside a previous order entered by another judge when it is necessary to reach a just and correct result. Gallimore v. Missouri Pacific Railroad Co., 635 F.2d 1165, 1171-72 (5th Cir. 1981); Robinson v. Parrish, 720 F.2d 1548, 1550 (11th Cir. 1983).

Further, the New Mexico Supreme Court carefully limited its decision to the narrow issue presented before it, that is, whether dismissal after the close of Plaintiff's evidence was proper. Smith Machinery Corp. v. Hesston, Inc., 102 N.M. at 253. It specifically did not pass on the possible outcome of the merits of the case after Hesston had an opportunity to present evidence. Id. at 254. The posture of the case as it stands before this Court is, therefore, different from that presented on appeal to the New Mexico Supreme Court. A court is not bound to follow a prior ruling as the law of the case when new evidence or argument is before the Court. Bonjorno v. Kaiser Aluminum and Chemical Corp., 752 F.2d 802, 807 (3d Cir. 1984), cert. denied, 106 S.Ct. 3284. The record before this Court

is much more extensive than the record before the New Mexico Supreme Court in Smith Machinery Corp. v. Hesston, Inc., and the Court's decision is not necessarily in conflict with the New Mexico Supreme Court's decision. See United States v. Robinson, 690 F.2d 869, 871-72 (11th Cir. 1982).

For all the reasons stated above, the Court finds that it is not constrained by the law of the case from passing on all issues presented in Defendant's Motion for Summary Judgment.

II. SHERMAN ACT CLAIM. There are two basic analyses for antitrust cases. Some types of contractual arrangements are deemed unreasonable as a matter of law without the necessity of analyzing the market context in which the arrangement is found. Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. 2, 9 (9184). These are per se violations.[5] All other

---

[5]Per se analysis has been adopted by the Supreme Court largely because the rule of reason analysis generally requires extensive, prolonged, and difficult consideration of the impact of the alleged violation on the market, and the Supreme

alleged violations are analyzed under the "rule of reason," in which the question is whether the conduct unreasonably interferes with competition in a free marketplace.

A. Per Se Analysis. Both parties rely on Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. 2 (1984), to support their respective positions on the Sherman

---

Court opted for ease of decision, predictability and economy for litigants and courts in the context of agreements which it deems "plainly anticompetitive." See, e.g., Arizona v. Maricopa County Medical Society, 457 U.S. 332, 351 (1982); Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 50 n. 16 (1977); Northern Pacific R. Co. v. United States, 356 U.S. 1, 5 (1958). In the context of tying arrangements, considerable confusion has developed because of the recognition that not all tying agreements are anticompetitive at all, and many are, in fact, procompetitive. See NCAA v. Board of Regents, 468 U.S. 85, 104 n. 26 (1984). The means for deciding which tying agreements are "plainly anticompetitive" enough to justify per se treatment has become so complex and difficult that the objectives of the per se rule are no longer being realized through its use. See Jefferson Parish, 466 U.S. at 32-42 (O'Connor, J., concurring in the judgment).

Act claim. Jefferson Parish set forth the appropriate analysis for tying agreement cases under § 1 of the Sherman Act. Under Jefferson Parish the threshold question is whether the tying agreement presents a substantial potential for impact on competition. Id. at 16. If the tying arrangement does not involve a substantial potential for impact for competition, then it is not a per se violation and it is analyzed under the rule of reason. If the tying arrangement does violate the threshold requirement, then the Court must continue consideration of whether it is a per se violation under a two-step analysis, to determine whether anticompetitive forcing is likely. Id. The Court must determine (1) whether the tying product and the tied product are really two distinct products and (2) whether anticompetitive "forcing" of the tied product is probable. Id. at 18. Step two involves a look at whether the

Defendant has sufficient market power to engage in coercive tactics.[6]

1. Threshold inquiry: Does the alleged tying agreement present substantial potential for impact on competition? Hesston argues that the tying arrangement alleged in this case fails to pass the threshold inquiry and is, therefore, not a per se violation. The Court agrees.

The Supreme Court delineated two situations in which a tying arrangement poses a substantial potential for impact

---

[6]The Jefferson Parish analysis is stated slightly differently than the three element analysis previously employed. The test for per se violation was often stated as follows: First, purchases of the tying product must be conditioned upon purchases of a distinct tied product; second, a seller must possess sufficient power in the tying market to compel acceptance of the tied product; third, the tying arrangement must foreclose to competitors of the tied product a not insubstantial volume of commerce. See Fox Motors, Inc. v. Mazda Distributors (Gulf), Inc., 806 F.2d 953, 957 (10th Cir. 1986). The considerations are essentially the same, but the Court is bound by the analytical structure specified in Jefferson Parish.

on competition. There is substantial potential for impact on competition if the tying agreement forecloses a portion of the market which was otherwise available to other sellers, or if the agreement forecloses a substantial volume of commerce. Jefferson Parish, 466 U.S. at 16. The portion of the market foreclosed to competitors must be a "not insubstantial" volume of commerce. Fox Motors, Inc. v. Mazda Distributors (Gulf), 806 F.2d 953, 954 (10th Cir. 1986). The Court must focus strictly on the potential anticompetitive consequences of the tying arrangement. Id. at 957. Procompetitive benefits allegedly flowing from a challenged practice may be weighed in a rule of reason analysis, Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977), but must be disregarded under the per se analysis. Fox Motors, 806 F.2d at 957.

Hesston urges the Court to adopt a third threshold element which has been applied in the Seventh Circuit. Under Carl Sandburg Village Condominium Ass'n No. 1 v. First Condominium Development

Co., 758 F.2d 203, 210 (7th Cir. 1985), and Will v. Comprehensive Accounting Corp., 776 F.2d 665, 674 (7th Cir. 1985), cert. denied, 106 S.Ct. 1659, the Seventh Circuit held that a tying arrangement does not present a substantial potential for impact on competition if there is no substantial danger of the seller acquiring market power in the tied product market as a result of the alleged tie. This particular element has not been adopted nor rejected by the Tenth Circuit, and as far as the Court can ascertain, has never been presented for the Tenth Circuit's consideration. The Court believes, however, that the Tenth Circuit would adopt this third element in its per se analysis of tying agreements.[7]

Jefferson Parish does not indicate that the two considerations set forth therein

---

[7]The Court notes that the Tenth Circuit chose to align itself with the Seventh Circuit on another issue concerning per se analysis in vertical restraint cases on which the circuits were split. Westman Commission Co. v. Hobart International, Inc., 796 F.2d 1216, 1222-23 (10th Cir. 1986).

are meant to be exclusive. See id. at 16. Carl Sandburg and a number of other circuits have applied one other such factor, both before and after Jefferson Parish, namely that the seller of the tying product must have some degree of economic interest in the market for the tied product. Carl Sandburg, 758 F.2d at 207-08; Midwestern Waffles, Inc. v. Waffle House, Inc., 734 F.2d 705, 712 (11th Cir. 1984); Roberts v. Elaine Powers Figure Salons, Inc., 708 F.2d 1476, 1478-81 (9th Cir. 1983); Venzie Corp. v. United States Mineral Products Co., Inc., 521 F.2d 1309, 1317 (3d Cir. 1975); Keener v. Sizzler Family Steak Houses, 597 F.2d 453, 456 (5th Cir. 1979); Pose, Inc. v. Miller Brewing Co., 642 F. Supp. 1198, 1209 (E.D.N.Y. 1986). Other factors in addition to those given in Jefferson Parish and Carl Sandburg will almost certainly be identified as different factual situations arise.

Smith energetically argues that the Seventh Circuit is a renegade among circuits in regard to antitrust law, and that this Court should not, therefore,

adopt the Seventh Circuit's analysis. Smith bases its argument, in part,[8] on the fact that Carl Sandburg cites only to the concurring opinion of Justice O'Connor in Jefferson Parish as support for its addition of this third threshold inquiry element. The Court does not believe that reliance on a concurrence is grounds for treating a court as a renegade. The majority in Jefferson Parish had no need to adopt or reject the element discussed by Justice O'Connor in her concurrence, since the majority found upon the more traditional elements that plaintiff had failed to establish a per se violation. Justice O'Connor's opinion, joined by three other justices, elaborates a bit more on the problems attendant to the per se analysis as it has evolved.

The Tenth Circuit has noted that the state of the law on per se violations is in a state of evolution. Westman

---

[8] The other part of the argument is that the Seventh Circuit's thinking is tainted by Chicago School of Law and Economics thinking. The Court declines to enter into this philosophical debate.

Commission Co. v. Hobart International, Inc., 796 F.2d 1216, 1222 (10th Cir. 1986). Westman discussed some of the problems inherent in per se analysis in the context of vertical restraint cases. Id. at 1224-25. While Westman indicated that its decision did not extend to tying arrangement claims, the Court reads Westman as a step by the Tenth Circuit in the direction of limiting per se violations generally.

Further, the Seventh Circuit's approach is sound. The purpose of the rule against certain tying arrangements is to stop the extension of market power from one product to another. Jefferson Parish, 466 U.S. at 14; Will, 776 F.2d at 671. If a seller cannot hope to obtain market power through the tying arrangement, the seller cannot, as a result of the tying agreement, violate that purpose. Thus, application of that criterion as a threshold question in analyzing a per se violation will serve to spare litigants and courts from prolonged, expensive, and unnecessary litigation, in much the same way that per se analysis theoretically functions.

For all these reasons, the Court finds that implementation of the third threshold question, as set forth in Carl Sandburg, is proper, and the Court will consider all three elements as they apply to the undisputed facts of this case.

a. Foreclosing market to other sellers. The arrangement attempted by Hesston fails the first threshold per se requirement because it did not foreclose competing manufacturers from selling their tractors. The agreement contained no restrictions on Smith's ability to continue to carry the John Deere tractor, or to carry any other line of tractors. Even when a purchaser is "forced" to buy a product he would not have otherwise bought, even from another seller, there can be no adverse impact on competition if no portion of the market which would otherwise have been available to other sellers has been foreclosed. Jefferson Parish, 466 U.S. at 16; Fox Motors, 806 F.2d at 958.

Smith argues that even absent such restrictions, it would have been precluded as a practical matter from carrying John

Deere tractors because of the expense of adding the Hesston tractor. However, the antitrust laws protect competition, not competitors, and even if Smith would have sacrificed revenue by investing in inventory and extending its showroom, etc., "[a]ny such burden . . . derived from engaging in competition and in no way foreclosed competing manufacturers." Fox Motors, 806 F.2d at 959.

Further, any such expenditure would have been de minimus, and therefore insufficient as a matter of law to foreclose purchases by Smith of competing tractors. The only competent evidence before the Court on the question of the initial set-up cost of carrying the tractor states that the cost, including parts, tools, workshop manuals, and freight, service and interest charges, would be approximately $3,600 plus the cost of a round trip ticket from Roswell to Wichita, Kansas for an employee to train in service and repair of the tractors. Given the dollar volume of Smith's business, just making the $4,000 outlay could not, as a matter of law, have

precluded Smith from purchasing John Deere tractors.

Smith attempts to raise an issue of fact through Smith's assumptions that Smith would have had to pay for the tractors in advance. However, Jerry Smith admitted at his deposition that he did not know Hesston's tractor financing terms and did not know what capital outlay would be required to carry the tractor. Smith's assertion is, therefore, mere speculation, not based on the personal knowledge of any witness. The 1981 Hesston Tractor Terms to Dealers and Landis deposition are competent evidence of those costs. Smith failed to raise a genuine issue of material fact.

Nothing in the record raises a genuine issue of material fact indicating that Smith Machinery would have been foreclosed from selling the John Deere tractor had it agreed to sell Hesston tractors as well. John Deere was, therefore, not adversely impacted and no portion of the market would have been foreclosed. Smith's claim does not pass the first element of the threshold per se analysis.

b. Substantial amount of commerce foreclosed. Nor could the alleged tying arrangement foreclose a substantial amount of commerce, thereby commanding per se treatment. At most, the tying arrangement would have resulted in the sale by Smith of Hesston tractors instead of John Deere tractors. According to a top Smith employee, in an average year, fifty to sixty new tractors are sold in the Pecos Valley, fewer than half of which were sold by Smith. At best, then, Smith sold fewer than thirty tractors per year. Out of a North American market of 140,231 tractors in 1982, 30 tractors, the maximum number of tractor sales which arguably could have been affected by the tying arrangement, could not, as a matter of law, be said to be a substantial amount of commerce.

c. Substantial danger that Hesston could obtain market power in the tied product market. The record is devoid of evidence that would support a finding that Hesston has any chance of obtaining market power in the tied product, or tractor, market. Tractors are the largest product line by dollar value in the North American

market. In 1982, tractor sales represented 49.17% of the total dollar volume of farm equipment sales in North America by all manufacturers, with sales of 140,231 units. Since the introduction of its tractor line in 1980, Hesston has had a unit volume of tractor sales of less than 1.5% of the total number of tractors sold in North America. In 1982 Hesston sold only 3 tractors in New Mexico, for a market share of less than one percent of the total sold in New Mexico. Tractors are the single most important piece of farm machinery and the tractor market is an active and competitive one. Quite obviously, Hesston, with such a minuscule share of the market, does not pose a threat of causing a tidal wave or even a ripple in the North American tractor market.

Further, the Hesston tying arrangement did not require any consumer to purchase the Hesston tractor. The agreement merely made the tractor available to consumers. Making the product available in no way insures success in the consumer market, as Hesston has learned, and success will come

only if Hesston's product has a competitive edge. If Hesston acquires any degree of success, it will be the result of that competitive edge. That kind of success is certainly not illegal under the antitrust laws.

Therefore, Smith has failed to raise a genuine issue of material fact as to the third element of the per se analysis as well. Thus, under all three prongs of the threshold per se analysis, there is no genuine issue of any material fact which would support a finding that the alleged tying arrangement should be treated as a per se violation.

B. Rule of Reason Analysis. Since the Court has determined that the tying arrangement does not present a situation which is appropriately analyzed as a per se violation of the Sherman Act, the Court must consider whether there is a genuine issue of material fact as to whether the tying agreement violates the rule of reason.

Under the rule of reason, "[t]he true test of legality is whether the restraint imposed is such as merely regulates and

perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition." National Society of Professional Engineers v. United States, 435 U.S. 679, 691 (1978), quoting Chicago Board of Trade v. United States, 246 U.S. 231, 238 (1918). In Carl Sandburg, the Seventh Circuit determined that, as a matter of law, a tying agreement cannot violate that rule, that is, it cannot impair competition, if there is no substantial danger that, by virtue of the tying agreement, the seller will obtain market power in the tied product. Carl Sandburg, 758 F.2d at 210.

The rationale behind applying this threshold question in the per se context is equally applicable under the rule of reason. Also, in the context of rule of reason analysis, it is permissible for the Court to consider procompetitive benefits of the allegedly unlawful behavior. From the consumer's point of view, the Hesston tying arrangement actually enhanced competition rather than restrained it, since Hesston made another line of tractors available to the consumer without

eliminating any other choice from the market.

Thus, a showing that there is a substantial danger that Hesston will acquire market power in the tied product is a threshold criterion for rule of reason analysis as well as for per se analysis. Carl Sandburg, 758 F.2d at 210-11. Having found that there is no genuine issue of material fact to present to a jury on whether that substantial danger exists, the Court must, therefore, grant summary judgment in favor of Hesston under the rule of reason as well.

C. New Mexico Antitrust Act Claim. The New Mexico Antitrust Act must be "construed in harmony with judicial interpretations of the federal antitrust laws." N.M.Stat.Ann. § 57-1-15 (1985 Supp.); Smith Machinery Corp. v. Hesston, Inc., 102 N.M. at 249. In accordance with the decisions rendered herein on the Sherman Act claim, summary judgment in favor of Hesston is, therefore, also proper with respect to the New Mexico Antitrust Act claim.

III. Clayton Act Claim. The Court finds that disposition of Plaintiff's claim under § 3 of the Clayton Act is controlled by Black Gold, Ltd. v. Rockwool Industries, Inc., 729 F.2d 676 (10th Cir.), reh'g denied, 732 F.2d 779 (10th Cir.), cert. denied, 469 U.S. 854 (1984). The plaintiff in Black Gold claimed that Rockwell Industries had violated § 3 of the Clayton Act by tying the sale of its blown wool insulation to the sale of its batt insulation. Id. at 684. Black Gold had refused to purchase the batt insulation and was therefore unable to obtain the blown insulation. Id. Black Wool alleged that it was injured by Rockwell's refusal to deal with it for blown insulation alone. Id. at 685. The Tenth Circuit held that a refusal to deal, in the absence of an actual sale or lease to the plaintiff, is not within the scope of § 3 of the Clayton Act. Id. Therefore, a directed verdict in favor of the defendant on the Clayton Act claim was proper. Id.

Smith Machinery attempts to distinguish its Clayton Act claim from the claim

dismissed in Black Gold on the fact that a contract existed between Smith Machinery and Hesston. The Court is not persuaded that a different conclusion is required. Had a contract been entered into between Smith and Hesston for the sale of the tractors which Smith refused to purchase after the condition of tying the sale to other products was placed on the sale, that would satisfy the "sale or contract for sale" requirement of § 3 of the Clayton Act. However, such is not the case. Smith does not allege that it agreed to purchase Hesston's tractor. The fact that Smith and Hesston were parties to "various dealership contracts" which governed their relationship prior to the alleged attempted tying arrangement does not bring their situation inside the scope of § 3 of the Clayton Act and outside the scope of Black Gold. In so holding, the Court is not deciding that an attempted tying of the sale of one product to the sale of another is "perfectly legal." Rather, the Court is deciding that, as stated, the claim is not one for which relief can be granted under this

particular statute. Therefore, Smith's claim based on § 3 of the Clayton Act (15 U.S.C. § 14) must be dismissed.

CONCLUSION

There is no genuine issue of material fact as to whether Smith's Sherman Act claim constitutes a per se antitrust violation. As a matter of law, the alleged tying arrangement fails to meet the threshold requirement of a per se violation because it does not present a substantial potential for adverse impact on competition. Further, there is no genuine issue of material fact as to whether the alleged tying arrangement violates the Sherman Act under the rule of reason. Hesston is, therefore, entitled to summary judgment in its favor on the Sherman Act claim. Likewise, summary judgment in favor of Hesston must be granted on the New Mexico Antitrust Act claim. Smith's Clayton Act claim must be dismissed for failure to state a claim upon which relief can be granted because no actual sale or lease or agreement to

sell or lease the tied product occurred between the parties. An appropriate Order shall be entered herewith.

/s/Santiago E. Campos
United States District Judge

APPENDIX C

IN THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 87-1597

SMITH MACHINERY CORPORATION, INC.
Plaintiff-Appellant,

v.

HESSTON CORPORATION,
Defendant-Appellee.

August 24, 1989

ORDER

Before HONORABLE WILLIAM J. HOLLOWAY, JR., HONORABLE ROBERT H. McWILLIAMS, HONORABLE MONROE G. McKAY, HONORABLE JAMES K. LOGAN, HONORABLE STEPHANIE K. SEYMOUR, HONORABLE JOHN P. MOORE, HONORABLE STEPHEN H. ANDERSON, HONORABLE DEANELL R. TACHA, HONORABLE WADE BRORBY and HONORABLE DAVID M. EBEL, CIRCUIT JUDGES.

This matter comes on for consideration of appellant's petition for rehearing and suggestion for rehearing en banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the petition for rehearing and suggestion for rehearing en banc were transmitted to all judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing en banç, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied. Judge Bobby R. Baldock did not participate.

Entered for the Court

/s/Robert L. Hoecker

ROBERT L. HOECKER, CLERK